IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ViewRay, Inc., *et al.*,	Case No. 23-10935 (___)
Debtors.[1]	(Joint Administration Requested)

DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING THE DEBTORS TO (I) PAY PRE-PETITION EMPLOYEE OBLIGATIONS, (II) MAINTAIN AND CONTINUE EMPLOYEE BENEFIT PROGRAMS AND PAY ADMINISTRATIVE OBLIGATIONS RELATED THERETO, AND (III) AUTHORIZING BANKS TO HONOR AND PROCESS CHECKS AND ELECTRONIC TRANSFER REQUESTS RELATED THERETO

ViewRay, Inc. and its affiliate ViewRay Technologies, Inc. (collectively, the "Debtors"), the debtors and debtors in possession in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), hereby file this motion (this "Motion") for the entry of interim and final orders, substantially in the forms attached hereto as **Exhibit A** (the "Proposed Interim Order") and **Exhibit B** (the "Proposed Final Order," and together with the Proposed Interim Order, the "Proposed Orders"), (i) authorizing, but not directing, the Debtors, in accordance with their stated policies and in their discretion, to (a) pay prepetition employee (including Independent Contractors, defined below) wages, salaries, and other accrued compensation; (b) pay accrued prepetition obligations to supplemental workers employed by the Debtors indirectly through national and foreign agencies; (c) make contributions to prepetition benefit programs and continue such programs in the ordinary course of their business; (d) honor workers' compensation obligations; (e) make payments for which prepetition payroll deductions were made; (f) pay processing costs and administrative expenses relating to the foregoing payments and contributions;

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are ViewRay, Inc. (7485) and ViewRay Technologies, Inc. (8429). The mailing address for each of the Debtors is 1099 18th Street Suite 3000, Denver, CO 80202.

and (g) make payments to third parties incident to the foregoing payments and contributions (collectively, the "Employee Wages and Benefits"); and (ii) authorizing banks and other financial institutions (collectively, the "Banks") to honor and process checks and electronic transfer requests related to the foregoing. In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of Paul Ziegler in Support of Debtors' Chapter 11 Petitions and First Day Motions and Applications* (the "First Day Declaration").[2] In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012 (the "Standing Order"). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution.[3] Venue is proper in the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief sought herein are sections 105(a), 363(b), 507(a)(4), 507(a)(5), and 541 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") and Rules 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the First Day Declaration.

[3] Pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), the Debtors consent to the Court's entry of a final judgment or order with respect to this Motion if it is determined that the Court, absent consent of the parties, cannot enter a final order consistent with Article III of the United States Constitution.

GENERAL BACKGROUND

3. On the date hereof (the "Petition Date"), each of the Debtors filed with the Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are authorized to operate their business and manage their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or an examiner. The Debtors have requested that the Chapter 11 Cases be jointly administered for procedural purposes only pursuant to Bankruptcy Rule 1015(b).

4. As set forth in the First Day Declaration, the Debtors design, manufacture, and market MRIdian, a magnetic resonance image-guided radiation therapy system to simultaneously image and treat cancer patients. Additional information regarding the Debtors' business, capital structure, and the circumstances leading to the filing of the Chapter 11 Cases is set forth in the First Day Declaration.

BACKGROUND RELATING TO THE MOTION

A. The Debtors' National and International Workforce

5. Prior to the Petition Date, the Debtors' workforce consisted mainly of sales personnel, product developers, engineers, and general business and administrative support in the United States and abroad. Between April and June, 2023, the Debtors implemented a reduction in force of 36 employees, comprising 30 U.S. employees and 6 foreign employees. Beginning July 14, 2023, and continuing through July 21, 2023, the Debtors are implementing a further reduction in force of 71 employees, comprising 48 U.S. employees and 23 foreign employees.

6. After implementation of this reduction in force, the Debtors will employ a total of approximately 232 employees globally, including 162 full-time employees in the United States (the "U.S. Employees"), 40 employees abroad (the "Foreign Employees"), and 30 temporary part-

time employees (the "Supplemental Employees", and collectively with the U.S. Employees and the Foreign Employees, the "Employees").[4] None of the Employees are union members.

7. The Debtors' U.S. Employees are employed directly by the Debtors. And with the exception of 13 Independent Contractors in Sofia, Bulgaria (who are employed directly by the Debtors), the Debtors' Foreign Employees (located in Belgium, Denmark, Germany, Hong Kong, Japan, Korea, Sweden, the United Arab Emirates, and the United Kingdom) are employed through Globalization Partners, Inc. ("Globalization Partners"), which functions as a "Global Employer of Record" for the Debtors pursuant to that certain Master Services Agreement the Debtors entered into with Globalization Partners on or about August 14, 2017 (the "Globalization Partners Services Agreement").

8. Under the Globalization Partners Services Agreement, Globalization Partners performs payroll calculations, facilitates the review and payment of employees' expense reports, makes third-party payments for withheld taxes, insurances, and other required benefits and payments pursuant to the laws of the applicable jurisdictions, and provides other related services on a monthly basis.

9. Further, pursuant to the Globalization Partners Services Agreement, the Foreign Employees are hired and managed by Globalization Partners; however, the Globalization Partners Services Agreement provides that the Debtors are responsible for the salaries and other costs and financial liabilities of the Foreign Employees (including, without limitation, incentive and bonus plans, accrued vacation and sick pay, and other benefit plans). More specifically, the Debtors are

[4] The Employees include 30 independent contractors (the "Independent Contractors") in the United States and abroad. For purposes of this Motion, the Debtors intend for the term "Employees" to include each Independent Contractor, and the Debtors seek authority, but not direction, to pay the Independent Contractors and to continue providing any applicable benefits to the Independent Contractors in the same manner as the Employees as set forth in this Motion.

required under the Globalization Partners Services Agreement to provide Globalization Partners with the funds to pay or otherwise satisfy the obligations owed to the Foreign Employees. Moreover, the Debtors are required to submit various setup fees, monthly servicing fees, and international wiring fees, among others, to Globalization Partners in accordance with the Globalization Partners Services Agreement (the "Globalization Partners Servicing Fees").

10. In addition, and pursuant to the Globalization Partners Services Agreement, Globalization Partners issues invoices to the Debtors for all liabilities due in connection with the Foreign Employees. In turn, the Debtors authorize Globalization Partners to, among other things, automatically withdraw via ACH amounts from the Debtors' bank account to cover the invoices. Critically, the Debtors must submit to Globalization Partners payment for invoices due, which includes any payments due to the Foreign Employees, within three days of receipt of the invoices, which includes payments for salaries and bonuses, if applicable. Globalization Partners will not make any payments to the Foreign Employees until it has received payment in full from the Debtors.

11. As of the Petition Date, the Debtors believe there are no outstanding amounts owed on account of the services provided to the Debtors and on account of any Globalization Partner Servicing Fees under the Globalization Partners Services Agreement in connection with the Foreign Employees. Further, as of the Petition Date, Globalization Partners holds deposits totaling approximately $1.6 million that were previously paid by the Debtors in connection with the onboarding of the Foreign Employees.[5]

[5] Because Globalization Partners is the employer of record in the applicable jurisdictions, it requires a deposit at the time of an employee's hire to defray amounts that would be due to the employee upon separation under the law of the applicable jurisdiction (e.g., for mandatory notice periods prior to separation).

12. The Debtors seek authority, but not direction, to continue to pay amounts owed to Globalization Partners in connection with the Foreign Employees in the ordinary course of business during the pendency of the Chapter 11 Cases.

13. In addition to the U.S. Employees and the Foreign Employees, the Debtors supplement their workforce by retaining a small number of temporary Supplemental Employees whose services are procured indirectly through third-party foreign/or US staffing agencies and 1099 contractors, such as CitiusTech Inc, Modis, Ryzen Solutions, and Robert Half (collectively, the "Staffing Agencies"). The Supplemental Employees provide a variety of services to the Debtors, including research and development, janitorial, and back-office support functions.

14. The Employees perform a variety of critical functions for the Debtors, and their knowledge, skills, and understanding of the Debtors' infrastructure, business operations, and vendor and customer relations are essential to the success of the Chapter 11 Cases. Without the continued service and dedication of the Employees, it will be difficult, if not impossible, to operate the Debtors' business without an unexpected or inopportune interruption, and to prosecute the Chapter 11 Cases in a manner that will maximize the value of the Debtors' estates. Thus, to successfully accomplish the foregoing, to minimize the personal hardship that the Employees will suffer if prepetition employee-related obligations are not paid when due or as otherwise expected, and to maintain employee morale and a focused workforce during this critical time, it is necessary and in the best interest of their estates and all stakeholders to seek the relief requested herein.

B. Obligations on Account of Employee Wages and Other Compensation, Deductions, and Payroll Taxes

i. Wages and Other Basic Compensation

15. On average, the Debtors' weekly combined gross aggregate payroll liability for the Employees as of the Petition Date is approximately $713,000, consisting of $594,000 in

connection with the Debtors' U.S. Employees, $96,000 in connection with the Foreign Employees "leased" from Globalization Partners (which amount includes the Globalization Partners Servicing Fees owed under the Globalization Partners Services Agreement), and $23,000 in connection with the Foreign Employees who are Independent Contractors.

16. The U.S. Employees are generally paid wages and salaries bi-weekly, via direct deposit, while Independent Contractors and Supplemental Employees are paid on a monthly basis. In some limited circumstances, Employees may be paid by check. The Debtors' most recent payroll payment to the U.S. Employees was made on July 14, 2023, for the period ending the same date (for continuing Employees) or July 21, 2023 (for Employees included in the most recent reduction in force), in the aggregate amount of $2,498,000, which amount includes payroll taxes. As a result of this payment, the Debtors believe there are no unpaid prepetition wages and salaries owed to U.S. Employees as of the Petition Date.

17. The Debtors' most recent payroll to Independent Contractors was made on July 14, 2023, for the period ending the same day (with the exception of one employee, who was paid up through the period ending July 21, 2023), in the aggregate amount of $62,000. As a result of this payment, the Debtors believe there are no unpaid prepetition wages and salaries owed to Independent Contractors as of the Petition Date.

18. The last payment to Globalization Partners on account of the Foreign Employees was made between June 7 and July 4, 2023 for the period ending June 30, 2023, in the aggregate amount of $1,145,000. As of the Petition Date, the Debtors believe that approximately $434,000 in prepetition wages and salaries have accrued on account of the Foreign Employees, for which the Debtors will be invoiced by Globalization Partners in the ordinary course post-petition. The Debtors believe the amount of these prepetition wages and salaries for any given Foreign

Employee is less than the $15,150 statutory cap provided for under section 507(a)(4) and (5) of the Bankruptcy Code (the "Statutory Cap").

19. As of the Petition Date, the Debtors owe approximately $371,000 for accrued but unpaid obligations to the Staffing Agencies associated with the Supplemental Employees. None of the Supplemental Employees is individually owed, or has outstanding invoices in excess of, the Statutory Cap.

20. Payroll to the U.S. Employees is funded in gross to ADP, the Debtors' third-party payroll administrator, two business days before each pay date, and ADP is responsible for distributing net pay to the U.S. Employees from its own accounts. The Debtors pay ADP approximately $10,735 per month for its administrative services. The last payment to ADP prior to the Petition Date occurred on June 22, 2023. As a result of this payment, the Debtors believe there are no unpaid amounts due to ADP as of the Petition Date.

21. Pending entry of the Proposed Final Order, no individual Employee will be paid more than the Statutory Cap, in the aggregate, for any unpaid wages or salary ("Unpaid Wages") and Paid Time Off (as defined below).

ii. Incentive Programs

22. *Annual Bonuses*. 201 of the Debtors' 202 full-time U.S. Employees and Foreign Employees who will remain after the most recent reduction in force are eligible to receive annual bonuses (the "Annual Bonus Program"). Eligibility for participation in the Annual Bonus Program depends upon the level of achievement of specific financial, operational, and strategic goals established by the Debtors' Board of Directors. The amount of an annual bonus may range from 4% to 100% of the Employee's base salary. Annual bonuses under the Annual Bonus Program are paid annually in the first quarter of the following year based upon audited financial results.

23. Given the significant benefit the Annual Bonus Program provides with respect to employee morale and motivation, the Debtors request authority, but not direction, to continue offering the Annual Bonus Program in the ordinary course of business and satisfy any prepetition obligations associated therewith. The bonuses earned for calendar year 2022 were paid in full to eligible Employees in the first and second quarter of 2023. Based on the Debtors' books and records, the Debtors do not believe they currently owe any amounts in connection with the Annual Bonus Program.

24. *Commission Program*. The Debtors also employ a network of sales agents, primarily in the United States, who earn commissions (the "Commissions") for goods sold in addition to the basic compensation described above (the "Commission Program" and, collectively with the Annual Bonus Program, the "Incentive Programs"). The Commission Program is designed to maintain the highest level of customer service and productivity in a highly competitive industry. Prior to the Petition Date and in the ordinary course of business, the Debtors typically paid Commissions on a monthly basis based on the individual Employee's net sales on commission-eligible items and goals established by the Debtors' management.

25. After implementation of the most recent reduction in force, only one of the Debtors' remaining full-time Employees will be eligible for the Commission Program, and the Debtors believe that no amounts are due to such Employee as of the Petition Date in connection with the Commission Program.

26. *Employee Stock Purchase Plan and Stock-Based Incentive Compensation Plan*: The Debtors formerly offered eligible U.S. Employees an employee stock purchase plan (the "ESPP") under which eligible U.S. Employees would use after-tax payroll deductions to acquire shares of the Debtors' stock at a 15% discount. This program was suspended effective July 1,

2023. In addition to the ESPP, the Debtors offer eligible Employees a stock-based incentive compensation plan (the "SBICP"), which provides for the grant of stock and stock-based awards, including stock options, among other things. The Debtors do not have any outstanding payment obligations under the ESPP or SBICP as of the Petition Date.

iii. Employee Expenses and Credit Card Program

27. The Debtors further offer eligible Employees the use of company credit cards (the "Credit Card Program") for work-related expenses, the payment of which would otherwise be the responsibility of the Debtors. Historically, the Debtors have been paying approximately $400,000 per month in connection with the Credit Card Program. The Debtors estimate that as of the Petition Date, approximately $622,000 remains outstanding in connection with the Credit Card Program. The Debtors seek authorization, but not direction, to continue to pay prepetition and postpetition costs in connection with the Credit Card Program during the pendency of the Chapter 11 Cases.

iv. Wage Deductions, Trust Fund Taxes, and Payroll Taxes

28. During each applicable pay period, the Debtors routinely deduct certain amounts from the Employees' pay, including, without limitation, (i) garnishments, child support, and similar deductions, and (ii) other pre-tax and after-tax deductions payable pursuant to certain of the Employee benefit plans discussed herein, such as the Employee's share of health care benefits, insurance premiums, 401(k) contributions, legally ordered deductions, and other miscellaneous deductions (collectively, the "Wage Deductions"), and forward those amounts to various third-party recipients. On average, the Debtors have historically deducted approximately $460,000 in the aggregate in Wage Deductions from the Employees' pay per month. As of the Petition Date, approximately $86,017 with respect to the U.S. Employees and approximately $79,000 with

respect to Foreign Employees employed through Globalization Partners have not yet been remitted to the various third-party recipients on account of the Wage Deductions.[6]

29. Furthermore, the Debtors are required by law to withhold from the Employees' pay certain amounts related to, among other things, federal, state, and local income taxes and social security and Medicare taxes (collectively, the "Trust Fund Taxes") for remittance to the appropriate federal, state, or local taxing authorities. The Debtors must then match from their own funds for social security and Medicare taxes and pay, based upon a percentage of gross payroll, additional amounts for state and federal unemployment insurance (the "Payroll Taxes", and collectively with Wage Deductions and Trust Fund Taxes, the "Employee Withholding"). Historically, on a monthly basis, the Debtors remit approximately $791,000 in Trust Fund Taxes and $183,000 in Payroll Taxes. As of the Petition Date, the Debtors believe all amounts have been remitted on account of the Trust Fund Taxes and Payroll Taxes.

C. Employee Benefits

30. The Debtors provide their eligible Employees, directly or indirectly, and in the ordinary course of business, with a number of employee benefits, including, but not limited to: (i) medical, dental, vision, and prescription insurance; (ii) paid sick and vacation days and other paid time off; (iii) a 401(k) retirement savings plan; and (iv) certain other miscellaneous employee benefits, including, but not limited to, basic life and accidental death and dismemberment insurance, disability benefits, health savings accounts, flexible spending accounts, and an employee assistance program (collectively, the "Employee Benefits").

[6] The Debtors believe there are no unremitted amounts on account of Wage Deductions with respect to Foreign Employees who are Independent Contractors.

i. Health Benefits

31. The Debtors sponsor several level-funded and fully-insured health and welfare benefit plans, including medical, dental, vision, and prescription coverage for eligible full-time Employees (collectively, the "Health Benefits") through Cigna, Kaiser Permanente, Delta Dental, MetLife, Prudential, and EyeMed. Eligible Employees make contributions in connection with the Health Benefits, which are withheld from their wages every payroll cycle. The Debtors pay an aggregate amount of approximately $212,000 per month on account of the Health Benefits for the U.S. Employees.[7]

32. As of the Petition Date, the Debtors believe there is between $4,000 and $12,000 owed on account of the Debtors' Health Benefits (depending whether an $8,000 check issued by the Debtors prepetition is honored).

ii. Paid Time Off

33. The Debtors provide various forms of paid time off, including vacation pay, sick pay, personal days, holiday pay, and various forms of leave to all qualifying Employees as a paid time-off benefit ("Paid Time Off"). Paid Time Off covers all scheduled vacation or personal time as well as unscheduled situations such as personal illness, family illness, and emergencies. Eligible Employees accrue Paid Time Off on a pro rata basis throughout the year based on length of service.[8] Paid Time Off for the Foreign Employees is solely provided to the Foreign Employees

[7] The costs for Health Benefits for the Foreign Employees leased from Globalization Partners are included in the amounts the Debtors submit on account of the invoices Globalization Partners issues to the Debtors. Foreign Employees who are Independent Contractors receive a monthly allowance as part of their regular pay that is intended to offset the cost of private health insurance.

[8] Prior to the Petition Date, the Debtors have historically paid out accrued Paid Time Off to eligible employees upon separation. From the most recent reduction in force and going forward, the Debtors do not intend to provide this benefit.

through Globalization Partners according to the laws and regulations of the applicable jurisdictions as well have in accordance with individual employment agreements.

34. The Debtors also offer their Employees five days each of bereavement time ("Bereavement Time").

35. In addition, the Debtors offer eligible Employees flex time off (the "Flex Time Off"), which entitles eligible Employees with the discretion to determine their own time-off needs while fulfilling all job responsibilities. An Employee must first exhaust all accrued Paid Time Off balances before the Employee becomes eligible for Flex Time Off.[9] Upon termination, the Employees are not entitled to a cash payment for accrued and unused Flex Time Off. Following the most recent reduction in force, approximately 76 U.S. Employees will be eligible for Flex Time Off. The Debtors estimate that, as of the Petition Date, approximately $1,052,000 in Paid Time Off is accrued but unpaid. The Debtors seek authority, but not direction, to continue the Flex Time Off program and to honor, at their discretion, accrued pre-petition Paid Time Off in the ordinary course. Pending entry of the Final Order, no individual Employee will be paid more than the Statutory Cap, in the aggregate, for Paid Time Off and Unpaid Wages.

iii. Severance Benefits

36. Prior to the Petition Date, the Debtors historically provided severance pay to rank-and-file employees who were terminated, consisting of a baseline amount of four weeks base salary, plus additional amounts based on length of service. However, there was no written

[9] When Flex Time Off was introduced in September 2022, Paid Time Off accrual for salaried U.S. Employees stopped. When the balance of their accrued Paid Time Off was exhausted, they became eligible for Flex Time Off. Any salaried U.S. Employees hired after September 2022 were automatically placed on the Flex Time Off plan. Hourly and part-time U.S.-based Employees remain on the Paid Time Off plan and continue to accrue and use Paid Time Off according to the Debtors' policy.

severance policy to this effect, and the Debtors have discontinued this practice in connection with the most recent reduction in force, and going forward.

37. The Debtors also offered certain executives and vice presidents severance pay in the event of change-of-control and non-change-of-control events, as set forth in their respective employment contracts. By this Motion, the Debtors do *not* seek authority to continue to honor these contractual severance obligations in the ordinary course of business; however, the Debtors reserve the right to seek, through another motion, approval of any incentive, retention, or severance programs with respect to "insiders."

iv. Parental Leave

38. The Debtors offer primary and secondary caregivers paid parental leave ("Parental Leave"). As of the Petition Date, the Debtors estimate that there is approximately $12,368 in accrued but unpaid Parental Leave.

v. Additional Employee Benefits

(a). 401(k) Plan

39. The Debtors offer a 401(k) plan for the benefit of their eligible Employees (the "401(k) Plan"). The program permits eligible Employees to defer a portion of their wages into the 401(k) Plan. Historically, on an annual basis, the Debtors withhold from wages of participating Employees contributions to the 401(k) Plan of approximately $2,536,000. As of the Petition Date, the Debtors believe that all amounts that were withheld from the Employees' wages on account of 401(k) contributions have been remitted to the 401(k) Plan.[10] The Debtors utilize Principal (the "401(k) Service Provider") for administrative and brokerage services, respectively, in connection

[10] Historically, the Debtors had also matched 50% of an Employee's contributions to the 401(k) Plan, up to 8% of the Employee's eligible pay. However, the 401(k) match was discontinued as of June 25, 2023.

with the 401(k) Plan. The 401(k) Service Provider does not charge the Debtors fees to administer the 401(k) Plan. Rather, the fees related to the administration of the 401(k) Plan are paid by the 401(k) Plan participants.

(b). Basic Life Insurance, AD&D Insurance, and Disability

40. The Debtors provide basic life and accidental death and dismemberment insurance ("Life and AD&D Insurance"), as well as short-term disability ("Disability Benefits"), to all Employees through Prudential. The Life and AD&D Insurance and the Disability Benefits cost the Debtors approximately $14,000 in the aggregate per month in premiums and administrative expenses for the U.S. Employees.[11] As of the Petition Date, the Debtors believe that there are no amounts currently outstanding in connection with the Life and AD&D Insurance and the Disability Benefits, including for unpaid premiums and administrative costs.[12] The Employees may also elect to purchase supplemental life, accidental death and dismemberment insurance, and long-term disability benefits at no cost to the Debtors.

(c). COBRA Benefits

The Debtors seek to continue to perform any obligations under Section 4980B of the Internal Revenue Code to administer Continuation Health Coverage (26 U.S.C. § 4980B) ("COBRA") in respect of former Employees and their covered dependents. WEX Benefits administers the Debtors' COBRA obligations. Any costs and fees associated with the COBRA program for Employees who separate from service post-petition will be collected from the Employees that utilize the COBRA benefit. For certain employees who separated from service

[11] No such benefits are provided to Foreign Employees who are Independent Contractors. Certain Foreign Employees who are leased from Globalization Partners are provided income protection (i.e., disability) benefits, depending on their elections and availability in their applicable jurisdictions, with the costs of any benefits so offered/elected being included in the invoices from Globalization Partners.

[12] Such costs include broker fees due to the Debtors' employee benefits broker, Mercer, which are imbedded in the rates paid for the benefits (primarily as part of the medical and basic life insurance fees).

prepetition and were provided a subsidy of some COBRA program costs as part of their severance packages,[13] the Debtors seek authority to continue to pay the applicable subsidy amounts post-petition, which are not expected to exceed $83,000.[14]

(d). Flexible Spending Account

41. The Debtors offer full-time U.S. Employees the use of flexible spending accounts ("FSAs") for various commuter, health, and dependent care expenses. The FSAs are administered by WEX Benefits, and funds are withheld from Employees' paychecks by the Debtors and disbursed monthly for reimbursement of claims. The Debtors estimate that as of the Petition Date they have withheld approximately $6,057 from Employees' paychecks that have not been disbursed for reimbursement of claims. The Debtors do not separately pay any fees associated with the FSA. Rather, such fees are part of the broker fee the Debtors pay to Mercer, as described in footnote 12 above.

42. The Debtors seek authority, but not direction, to continue to remit funds for reimbursement of claims during the pendency of the Chapter 11 Cases.

(e). Health Savings Accounts

43. The Debtors offer full-time Employees the use of health savings accounts ("HSAs") for various medical, dental, prescription, and visions expenses. The HSAs are administered by

[13] Prior to the Petition Date, the Debtors historically provided a subsidy of some COBRA program costs to certain employees as part of their severance packages. From the most recent reduction in force and going forward, the Debtors do not intend to provide this benefit.

[14] Under the Debtors' current billing setup, all medical, dental, and vision insurance carriers pull funds automatically. COBRA is listed as a sub-plan to the Debtors' active medical, dental, and vision plans and is included in the monthly invoices. The Debtors pay the carriers for all COBRA-electing employees, and the Debtors' COBRA vendor, WEX Benefits, collects the monthly premiums for employees whose COBRA benefits were not subsidized by the Debtors, and returns those premiums to the Debtors as reimbursement. The time and cost of reconfiguring this payment system so as to prevent funding of COBRA subsidies for employees who separated prepetition, while retaining the COBRA benefits themselves so as to remain in compliance with applicable law—and then notifying the affected employees of the changes, etc.—could well outstrip the amount of COBRA subsidies at issue. Moreover, the foreseeable effect on morale to remaining Employees if their former colleagues' health benefits were not continued as agreed could prove harmful to the Debtors' restructuring efforts.

Cigna/HSA Bank, and funds are withheld from Employees' paychecks by the Debtors and disbursed monthly for reimbursement of claims. In addition, the Debtors provide employer contributions to the HSAs, which are paid in two installments annually and vary based on coverage level. The Debtors pay Cigna/HSA Bank on a semi-annual basis for administration of the HSAs, with the most recent payment being approximately $25,000. As of the Petition Date, the Debtors have fully funded their obligations in respect to the HSAs for the calendar year 2023.

(f). Employee Assistance Program

44. The Debtors offer eligible Employees to participate in an employee assistance program designed to assist with Employees' clinical, legal, and financial needs, among others (the "Employee Assistance Program"). The Employee Assistance Program is administered by Guidance Resources and is included as a service through other benefits plans (i.e., without need for the Debtors to pay separate administrative fees for it). Accordingly, as of the Petition Date, the Debtors do not have any financial obligations in connection with the Employee Assistance Program.

(g). Parking and Cell Phone Reimbursement

45. The Debtors offer eligible Employees reimbursement of parking expenses[15] and cell phone expenses. With respect to the cell phone reimbursement, the Debtors have historically paid approximately $8,000 per month but expect to pay less going forward.

(h). Legal Plan

46. The Debtors offer eligible employees a legal plan through MetLaw Hyatt Legan (the "Legal Plan"), which offers participating Employees and their eligible dependents access to

[15] The Debtors historically provided a parking stipend to employees of their Denver office. As of July 2023, the stipend was discontinued, but the Debtors continue to reimburse parking expenses via Employees' expense reports.

legal advice and services from a nationwide network of attorneys with coverage for any personal legal issues. Through the Legal Plan, Employees have access to, among other services, telephone advice and office consultations on an unlimited number of legal matters as well as legal representation for matters covered under the Legal Plan. Premiums and fees for the Legal Plan are paid directly by the applicable Employees.

(j). Critical Illness, Accident, and Hospital Indemnity Insurance

47. The Employees may also elect to purchase, through MetLife, additional insurance coverage for critical illnesses, accidents, and payments that an Employee's medical plan might not cover in connection with a hospital stay (the "Additional Insurance Offers"), at no cost to the Debtors. As of the Petition Date, the Debtors estimate they have no more than $10,000 of outstanding payment obligations in connection with the Additional Insurance Offers.

(k). Automobile Allowance

48. The Debtors offer eligible Employees, who are primarily employed in the sale and service sectors of the Debtors' business, with a monthly car allowance (the "Automobile Allowance"). The eligible Employees routinely utilize their own vehicles to visit customer sites in order to provide customer support and maintenance. The Automobile Allowance is provided to such Employees to allow them to offset wear-and-tear, depreciation and insurance-related costs in connection with their own vehicles. The Debtors have historically paid approximately $18,700 per month on account of the Automobile Allowance but expect to pay less going forward. The Debtors seek authority, but not direction, to continue paying the Automobile Allowance during the pendency of the Chapter 11 Cases.

D. Workers' Compensation Program

49. Under applicable state law, the Debtors are required to maintain workers' compensation insurance programs to provide their Employees with workers' compensation insurance coverage for claims arising from or related to their employment with the Debtors (the "Workers' Compensation Program"). The Debtors maintain a fully-insured workers' compensation policy through Chubb. The annual cost of the Workers' Compensation Program is approximately $138,000. Payments are made in advance and reconciled at year end.

50. As of the Petition Date, the Debtors are aware of at least one pending workers' compensation claim, which is in the amount of approximately $32,000 resulting from an accident involving an employee and a ride-share vehicle. The Debtors are currently seeking reimbursement from the ride-share company in connection with this accident.

51. To ensure that claims incurred under the Workers' Compensation Program are resolved, the Debtors must pay outstanding prepetition liabilities associated with the Workers' Compensation Program, as well as outstanding policy premiums, as such amounts become due and owing. For the claims administration process in the Chapter 11 Cases to operate as efficiently as is possible, and to ensure that the Debtors comply with state law requirements, the Workers' Compensation Program must continue in the ordinary course of business.

RELIEF REQUESTED

52. By this Motion, the Debtors request that the Court enter the Proposed Orders, authorizing, but not directing, the Debtors, in accordance with their stated policies and in their discretion, to (i) pay prepetition amounts outstanding in respect of the Employee Wages and Benefits; (ii) continue to honor and provide the Employee Wages and Benefits in the ordinary course of business; (iii) pay processing costs and administrative expenses relating to the Employee

Wages and Benefits; and (iv) authorize the Banks to honor and process check and electronic transfer requests associated therewith.

BASIS FOR RELIEF

A. The Court Should Authorize, But Not Direct, the Debtors, in Their Discretion, to Pay or Otherwise Honor the Employee Wages and Benefits

53. The Debtors seek the relief requested herein because any delay in paying or otherwise honoring the Employee Wages and Benefits could severely disrupt the Debtors' relationship with the Employees and irreparably impair the Employees' morale at a time when their continued dedication, confidence, and cooperation are most critical to the Debtors and the success of the Chapter 11 Cases.

54. Employees are crucial to the operation of a company's business and they are crucial to the success of any chapter 11 case. The Debtors cannot risk the substantial disruption of their business and affairs that would, in all likelihood, accompany any decline in workforce morale attributable to the Debtors' failure to pay the Employee Wages and Benefits in the ordinary course of business. Absent the requested relief, the Employees would suffer great hardship and, in many instances, financial difficulties, since the monies requested herein are needed to enable the Employees to meet their personal obligations. Additionally, without the requested relief, the Debtors' stability would be undermined by the potential threat that otherwise loyal Employees at all levels would seek other employment.

55. Pursuant to section 507(a)(4) of the Bankruptcy Code, each Employee may be granted a priority claim for up to $15,150 for any "wages, salaries, or commissions, including vacation, severance, and sick leave pay" that was earned within 180 days prior to the Petition Date. *See* 11 U.S.C. § 507(a)(4). And under section 507(a)(5) of the Bankruptcy Code, Employees may ultimately be granted a priority claim for unpaid "contributions to an employee benefit plan"

arising from services rendered within 180 days prior to the Petition Date, in an amount up to $15,150, *less* the amount of any allowed priority claim under section 507(a)(4). *See* 11 U.S.C. § 507(a)(5).

56. To the extent that any claims for Unpaid Wages and Employee Benefits would be entitled to priority status under sections 507(a)(4) and (5) of the Bankruptcy Code, the Debtors would be required to pay these claims in full to confirm any chapter 11 plan. *See* 11 U.S.C. § 1129(a)(9)(B) (requiring payment of certain allowed unsecured claims for wages, salaries, and commissions, and certain allowed unsecured claims for contributions to an employee benefit plan). Thus, granting the relief requested herein would only affect the timing, and not the amount, of the payment of such amounts to the extent that they constitute priority claims.

57. Moreover, the vast majority of the Employees rely exclusively on their full compensation or reimbursement of their wages or expenses to continue to pay their daily living expenses, and these Employees will be exposed to significant financial difficulties if the Debtors are not permitted to satisfy and continue to provide the Employee Wages and Benefits. Additionally, if the Debtors are unable to honor such obligations, the morale and loyalty of the Employees will be jeopardized at a time when such support is critical to, among other things, their ability to effectively prosecute the Chapter 11 Cases.

58. Additionally, the Employee Withholding principally represents portions of the Employees' pay that governments (in the case of the Trust Fund Taxes and Payroll Taxes), the Employees (in the case of the voluntary Wage Deductions), and certain authorities (in the case of any involuntarily Wage Deductions) have designated for deduction from the Employees' pay. The Debtors' failure to pay these amounts could result in hardship to certain Employees and an administrative burden for the Debtors. Indeed, the Debtors would expect inquiries from garnishors

regarding any failure by the Debtors to submit, among other things, child support and alimony payments that are not the Debtors' property but, rather, have been withheld from the Employees' pay on such parties' behalf. And in any event, those deductions that have been withheld from Employees' paychecks on another party's behalf are not property of the Debtor's estate. *See* 11 U.S.C. § 541(b)(7) and (d). Further, federal and state laws require the Debtors and their officers to remit certain tax payments that have been withheld from their Employees' paychecks. *See* 26 U.S.C. § 6672 and 7501(a); *see also City of Farrell v. Sharon Steel Corp*., 41 F.3d 92, 95–97 (3d Cir. 1994) (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes); *DuCharmes & Co., Inc. v. State of Mich*. (*In re DuCharmes & Co*.), 852 F.2d 194, 196 (6th Cir. 1988) (noting that individual officers of a company may be held personally liable for failure to pay trust fund taxes). Moreover, if the Debtors cannot remit these amounts, the Employees may face legal action due to the Debtors' failure to submit such payments.

59. Finally, maintaining the Workers' Compensation Program is justified because applicable state law mandates this coverage. With respect to any claims related to the Workers' Compensation Program, the risk that eligible claimants will not receive timely payments with respect to employment-related injuries could have a devastating effect on the financial well-being and morale of the Employees and their willingness to remain in the Debtors' employ. Entry of the Proposed Orders will alleviate any such concerns, as it will allow the Debtors to avoid any unexpected or inopportune interruptions to their business operations, and enable them to maximize the value of the estates for the benefit of all stakeholders.

60. For the reasons set forth above, the Debtors submit that the relief requested herein is necessary, prudent, and in the best interests of the Debtors, their estates, and any party in interest.

B. The Court Should Authorize the Banks to Honor and Process the Debtors' Payments on Account of the Employee Wages and Benefits

61. The Debtors also request that the Court authorize the Banks, when requested by the Debtors, in their discretion, to honor and process checks or electronic fund transfers drawn on the Debtors' bank accounts to pay prepetition obligations described herein, whether such checks or other requests were submitted prior to, or after, the Petition Date, provided that sufficient funds are available in the applicable bank accounts to make such payments. The Debtors further request that all of the Banks be authorized to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Motion.

SATISFACTION OF BANKRUPTCY RULE 6003(b)

62. Pursuant to Bankruptcy Rule 6003(b), any motion seeking to use property of the estate pursuant to section 363 of the Bankruptcy Code or to satisfy prepetition claims within twenty-one days of the Petition Date requires the Debtors to demonstrate that such relief "is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003(b). As set forth throughout this Motion, the success of the Chapter 11 Cases will require the continued focus and dedication of the Employees, as any deterioration in employee morale or significant loss in workforce will have an adverse impact on the Debtors' ability, among other things, to continue to operate their business without any unexpected or inopportune interruption and to successfully prosecute the Chapter 11 Cases. Thus, if the relief requested herein is not granted, the failure to satisfy the Employee Wages and Benefits would cause the Debtors' estates immediate and irreparable harm by detracting from, and potentially derailing, the Debtors' chapter 11 efforts.

63. For this reason and those set forth above, the Debtors respectfully submit that Bankruptcy Rule 6003(b) has been satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

WAIVER OF STAY UNDER BANKRUPTCY RULE 6004(h)

64. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, any delay in paying the Employee Wages and Benefits would be detrimental to the Debtors, their estates, and their creditors. Indeed, the Debtors' ability to operate their business without any unexpected or inopportune interruption requires, in large part, an able and willing workforce, which the Debtors currently have in the Employees.

65. For this reason and those set forth above, the Debtors submit that ample cause exists to justify a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable to the Proposed Orders.

RESERVATION OF RIGHTS

66. Nothing in the Proposed Orders or this Motion (i) is intended or shall be deemed to constitute an assumption of any agreement pursuant to section 365 of the Bankruptcy Code or an admission as to the validity of any claim against the Debtors and their estates; (ii) shall impair, prejudice, waive, or otherwise affect the rights of the Debtors and their estates with respect to the validity, priority, or amount of any claim against the Debtors and their estates; or (iii) shall be construed as a promise to pay a claim.

NOTICE

67. The Debtors will provide notice of this Motion to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Office of the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) the Debtors' thirty (30) largest unsecured creditors (excluding insiders); (v) the Securities and Exchange Commission; (vi) counsel to MidCap Funding IV Trust (as administrative agent); (vii) the Banks; and (viii) all parties who have

filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

[*Remainder of page intentionally left blank*]

CONCLUSION

WHEREFORE, the Debtors respectfully request entry of the Proposed Orders, granting the relief requested herein and such other and further relief as is just and proper.

Dated: July 17, 2023

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